SUPREME COURT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 435

FEDERAL TRADE COMMISSION,
Petitioner,
vs.
NATIONAL CASUALTY COMPANY,
Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

The question presented is whether an appeal should be allowed from the decision of the United States Court of Appeals for the Sixth Circuit holding that under the McCarran-Ferguson Act (15 U. S. C. 1011-1015) the Federal Trade Commission is without jurisdiction to regulate the advertising practices of the respondent in those states where such practices are regulated by state law.

STATEMENT OF CASE

The only facts as found by the examiner, adopted by the Commission and accepted by the Court of Appeals which are pertinent to the issue involved may be summarized as follows:

Respondent, a Michigan corporation, with its principal office in Detroit, Michigan, is licensed in all of the states of the United States and the District of Columbia to sell its policies of insurance in their respective jurisdictions. All of respondent's insurance is sold by resident agents who live in and are licensed by the States or District in which they sell. No policies are sold by direct mail. Advertising material is furnished by the respondent to its agents who distribute it locally or on occasion have respondent mail it out for them. Most of the jurisdictions in which respondent's policies are sold have statutes extensively regulating its advertising; others regulate less extensively. The Federal Trade Commission, having held by a three to two decision that it had jurisdiction over respondent's advertising practices in all jurisdictions except Michigan irrespective of the existence of State statutes regulating such practices, found it unnecessary to make any finding as to whether there were any jurisdictions in which respondent sold insurance which did not have such statutes. On review the Court of Appeals held that under the McCarran-Ferguson Act the Federal Trade Commission was without jurisdiction to regulate respondent's advertising practices in those states where such practices are regulated by state law and remanded the case for further proceedings.

REASONS FOR DENYING THE WRIT

The decision of the United States Court of Appeals for the Sixth Circuit is correct and in conformity with applicable decisions of this Court and of Courts of Appeals of other circuits and is not in conflict with any other decision so as to warrant further review of this case by this Court.

In 1944 the long established and intricate system of State regulation of the business of insurance was convulsed by the decision in *United States v. South-Eastern Underwriters Association,* 322 U. S. 533, which discarded a long line of decisions and declared that the business of insurance, when conducted across state lines, involved interstate commerce and was therefore subject to Federal regulatory statutes (in that case, the Sherman Act).

The following year Congress attempted to set at rest the problems raised by this decision by passing the McCarran-Ferguson Act, 15 U. S. C. 1011-1015, which in the introductory section declared "that th econtinued regulation and taxation by the several States of the business of insurance is in the public interest" and then in Section 2 provided first that "the business of insurance * * * shall be subject to the laws of the several States" and second that:

> "No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance: *Provided,* That after January 1, 1948, [to which date a complete moratorium was provided in Section 3] * * * the Sherman Act, * * * the Clayton Act, and * * * the

> Federal Trade Commission Act, as amended, shall be applicable to the business of insurance to the extent that such business is not regulated by State law." (Bracketed material ours.)

Supreme Court Decisions. The first case to reach the Supreme Court involving the McCarran-Ferguson Act was *Prudential Insurance Company v. Benjamin*, 328 U. S. 408 (1946), involved the right of the State of South Carolina to impose a discriminatory license tax on foreign insurance companies. In holding the tax valid this Court, at pages 429-431, defined the meaning and intent of the McCarran-Ferguson Act as follows:

> "Obviously Congress' purpose was broadly to give support to the existing and future state systems for regulating and taxing the business of insurance. This was done in two ways. One was by removing obstructions which might be thought to flow from its own power, whether dormant or exercised, except as otherwise expressly provided in the Act itself or in future legislation. The other was by declaring expressly and affirmatively that continued state regulation and taxation of this business is in the public interest and that the business and all who engage in it 'shall be subject to' the laws of the several states in these respects.
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> "Moreover, in taking this action Congress must have had full knowledge of the nation-wide existence of state systems of regulation and taxation; of the fact that they differ greatly in the scope and character of the regulations imposed and of the taxes exacted; and of the further fact that many, if not all, include features which, to some extent, have not been applied generally to other interstate business. Congress could not have been unacquainted with these facts and its purpose was evidently to throw the whole weight of its power be-

hind the state systems, notwithstanding these variations.

* * * * *

"* * * it clearly put the full weight of its power behind existing and future state legislation to sustain it from any attack under the commerce clause to whatever extent this may be done with the force of that power behind it, subject only to the exceptions expressly provided for."

In *Wilburn Boat Company v. Fireman's Fund Insurance Company*, 348 U. S. 310 (1955), in which this Court declined to apply federal admiralty rules to the interpretation of a maritime insurance policy, Mr. Justice Black, in reviewing the enactment and effect of the McCarran-Ferguson Act, made the following statements at pages 319 and 320:

"Passage of the bill followed *United States v. South-Eastern Underwriters Association, supra,* holding that, despite the Constitutional Doctrine embodied in the *Paul v. Virginia* line of cases, Congress had power under the Constitution to regulate interstate insurance transactions. In the South-Eastern case, however, all the opinions had emphasized the historical fact that states had always been free to regulate insurance. The measure Congress passed shortly thereafter, known as the McCarran Act, was designed to assure that existing state power to regulate insurance would continue.

* * * * *

"Under our present system of diverse state regulations, which is as old as the Union, the insurance business has become one of the great enterprises of the Nation. Congress has been exceedingly cautious about disturbing this system, even as to marine insurance where Congressional power is undoubted. We, like Congress, leave the regulation of marine insurance where it has been—with the States."

Courts of Appeals Decisions. Following the law as settled by the above cited decisions of this Court the Courts of Appeals have acted with complete unanimity in holding that under the McCarran-Ferguson Act the right to regulate the business of insurance is reposed in the states and in those states which have adopted regulations the Sherman Act, the Clayton Act and the Federal Trade Commission Act are not applicable.

In *North Little Rock Transportation Company v. Casualty Reciprocal Exchange,* 181 F. 2d 174 (1950), the Court of Appeals for the Eighth Circuit, in holding that inasmuch as Arkansas by statute regulated the fixing of insurance rates the Sherman Act was not applicable, said at page 176:

> "The purpose of the McCarran Act was to permit the States to continue the regulation of the business of insurance, unhampered, to the extent provided by the Act, by federal legislation relating to interstate commerce."

Application for writ of certiorari to review this decision was denied by this Court, 340 U. S. 823.

In *Crafts v. Federal Trade Commission,* 244 F. 2d 882, the Court of Appeals for the Ninth Circuit on February 27, 1957, in an action involving the Fireman's Fund Indemnity Company identical with that of the instant case, ruled that under the McCarran-Ferguson Act the power of the Federal Trade Commission over insurance advertising is limited and, therefore, a subpoena issued by the Commission for the production of all advertising matter used by the Fireman's Fund Indemnity Company without regard to the area or jurisdictions in which the advertising was used, is invalid. The Federal Trade Commission has applied for a writ of certiorari to review that decision.

In *American Hospital and Life Insurance Company v. Federal Trade Commission,* 243 F. 2d 719, the Court of Appeals for the Fifth Circuit on April 9, 1957, rendered its decision on the identical issue involved in the case at bar holding that under the McCarran-Ferguson Act the Federal Trade Commission was without jurisdiction to regulate insurance advertising in those states which had enacted laws for the regulation of false and deceptive advertising. The Federal Trade Commission has also applied for a writ of certiorari to review this decision.

Congressional Debates. The decisions of the Courts in the instant case and the above cited cases are in complete accord with the statements made by the Senate managers and others during the debates on the McCarran-Ferguson Act.

> "Mr. McCarran: During the three year moratorium the states may, if they see fit to do so, enact legislation for the purpose of regulation. If they do enact such legislation, to the extent that they regulate, they will have taken the business of insurance in the respective states out from under the Sherman Anti-Trust Act, the Clayton Act, and the other acts" (91 Cong. Rec. 1443).
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> Mr. Ferguson: "After the moratorium has expired, if a State has not legislated on the subjects covered by the three acts to which reference has been made, those acts shall be applicable to the business of insurance. But insofar as the State is concerned, which has specifically legislated on the subject, the three acts shall not apply" (91 Cong. Rec. 1444).
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> Mr. Ferguson: "There is no attempt here to have Congress throttled in the future in acting upon insurance legislation. Subsection (b) of Sec-

tion 2 provides that if Congress does act, the act shall specifically relate to the business of insurance.

"Mr. O'Mahoney: That is correct.

"Mr. Ferguson: What we have in mind is that the insurance business, being interstate commerce, if we merely enact a law relating to interstate commerce, or if there is a law in the books relating in some way to interstate commerce, it would not apply to insurance. We wanted to make sure that Congress would act specifically with reference to insurance in enacting the law.

"Mr. O'Mahoney: In other words, no existing law and no future law should, by mere implication, be applied to the business of insurance.

"Mr. Ferguson. That is correct" (91 Cong. Rec. 1487).

* * * * *

"Mr. Barkley: I am not uneasy about the situation. I do not believe that hereafter the Congress will not have full authority to deal with the subject if the States do not do so" (91 Cong. Rec. 1488).

CONCLUSION

The ruling in the instant case is that the Federal Trade Commission is without jurisdiction to regulate the insurance business of the respondent in those states where such business is regulated by state law.

This ruling is in conformity with the law as settled by this Court and with the decisions of the Courts of Appeals of other circuits which have ruled thereon. Review of this case is therefore not warranted and the petition for writ of certiorari should be denied.

Respectfully submitted,

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September, 1957.